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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHURCH OF SCIENTOLOGY INTERNATIONAL; BOWLES & MOXON; AND CHURCH OF SCIENTOLOGY OF ILLINOIS,

Petitioners,

v.

CULT AWARENESS NETWORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR A WRIT OF CERTIORARI

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December 16, 1997

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QUESTION PRESENTED

Whether Illinois may define its special injury requirement for the tort of malicious prosecution to include the coordination and encouragement of a series of lawsuits challenging discriminatory practices when relevant decisions of the Court have held that the activities of an organization and its attorneys in encouraging and coordinating individuals to bring a series of antidiscrimination cases are protected activities under the First Amendment to the Constitution of the United States?

RULE 29.6 STATEMENT

Petitioners Church of Scientology International, Bowles & Moxon, and Church of Scientology of Illinois have no parent companies or subsidiaries to list pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners Church of Scientology International, Bowles & Moxon, and Church of Scientology of Illinois respectfully petition for a writ of certiorari to review the opinion of the Supreme Court of Illinois in this case, which directly conflicts with decisions of the Court and abridges the First Amendment rights of petitioners.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois that petitioners seek to be reviewed (1a-18a),[1/] which reversed the judgments of the appellate and circuit courts in this case, is reported at 177 Ill.2d 267, 685 N.E.2d 1347, 226 Ill. Dec. 604 (1997). The opinion of the appellate court of Illinois affirming the dismissal of this action (19a-34a) is reported at 279 Ill. App. 3d 66, 664 N.E.2d 217, 215 Ill. Dec. 820 (1st Dist. 1996). The orders of the circuit court of Illinois dismissing the complaint of respondent Cult Awareness Network ("CAN") (35a, 36a-42a) are unreported.

JURISDICTION

The opinion of the Supreme Court of Illinois was entered on September 18, 1997. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

[1/] References to "(__a)" are to the pages in the appendix to this petition.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Statement of Facts

Petitioners Church of Scientology International ("CSI" or "the Church") and Church of Scientology of Illinois are religious organizations that have been recognized by the Internal Revenue Service as churches under 26 U.S.C. § 170, entitled to tax-exempt status under 26 U.S.C. § 501(c)(3). *See* Internal Revenue Service, *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986*, Publication 78 (rev. 11-96). CSI is the "mother church" of the Scientology religion, which numerous courts have recognized as a bona fide religion entitled to protection under

the First Amendment to the Constitution of the United States.[2/] Petitioner Bowles & Moxon is a law firm. (R. C212-C213.)[3/]

Respondent CAN is a not-for-profit educational organization that enjoys the benefits of federal tax exemption under 26 U.S.C. § 501(c)(3). (R. C212.) CAN has used its status as a tax-exempt organization to conduct a lengthy, bitter and one-sided nationwide campaign against certain religious and other voluntary membership organizations that it has subjectively identified as "cults." One of CAN's main targets has been the Scientology religion. In an effort to bring balance and fairness to CAN's so-called "educational" efforts, a number of Scientology parishioners, encouraged by their church, attempted to join CAN or CAN local affiliates or to attend CAN conferences, which were held at public accommodations. CAN refused to allow them to do so.

[2/] *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1160 (D.C. Cir.), *cert denied*, 396 U.S. 963 (1969); *Church of Scientology* v. *C.I.R.*, 823 F.2d 1310, 1313 (9th Cir. 1987) ("Scientology is an international religion with numerous churches around the world"), *cert. denied*, 486 U.S. 1015 (1988); *Church of Scientology Flag Service Org., Inc.* v. *City of Clearwater*, 2 F.3d 1514, 1519-20 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994); *Christofferson* v. *Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, 601 (1982), *cert. denied*, 459 U.S. 1206 (1983). *See Hernandez* v. *C.I.R.*, 490 U.S. 680, 684-85 (1989) (describing Scientology religious beliefs).

[3/] References to "R. ___" are to the pages of the clerk's record in the proceedings on appeal to the appellate court of Illinois.

In response, and again with the encouragement and assistance of their church, a number of Scientologists throughout the country brought separate antidiscrimination lawsuits against CAN or CAN local affiliates, based on applicable state and federal statutes, challenging CAN's refusal to permit them to become members, to affiliate with CAN, or to attend public CAN functions because of their religion. (R. C213-C227.) Some of these lawsuits were filed in federal district courts, alleging federal claims; others were filed in state courts, including New York, California, and Illinois, alleging state law claims. The lawsuits alleged that CAN and its affiliated organizations had an obligation as tax-exempt *educational* organizations to be open to and consider different points of view on questions on which CAN was involved, and that CAN therefore violated federal or state civil rights laws by refusing to permit individual Scientologists to join or affiliate with CAN or attend CAN meetings. (*Id.*)

A number of courts dismissed the individual actions on legal grounds, declining to adopt the plaintiffs' argument that CAN's status as a not-for-profit, public educational tax-exempt organization subjected it to coverage under applicable state or federal antidiscrimination statutes. (R. C215-217; C218-C227.)[4/] Several were dismissed as moot (or premature) when CAN, in response to the lawsuits, changed its national membership policy and permitted Scientologists to join. *See,*

[4/] At the time the suits were filed a similar issue arising under California's Unruh Act was pending in the California courts involving the Boy Scouts, which is as yet unresolved. *See Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 29 Cal. Rptr. 2d 580 (Cal. Ct. App. 2d Dist. 1994), *review granted and pending*, 874 P.2d 901, 31 Cal. Rptr. 2d 126 (Cal. 1994).

e.g., the *Bagley* case (R. C215.) Other cases were voluntarily dismissed by the plaintiffs (R. C227, C247, n.2, C256, n.4), presumably in response either to the change in CAN's policy or to the lack of success on the legal issue in other courts. CAN then instituted this action.

Proceedings Below

CAN filed its first complaint against petitioners and a number of other defendants on January 21, 1994 in the circuit court of Illinois. (R. C3-C37.) It withdrew that complaint in response to defendants' motion to dismiss (R. C63), and on June 8, 1994, it filed a four-count first amended complaint, alleging conspiracy to engage in malicious prosecution, conspiracy to interfere with right of association and assembly, infringement of right of association and assembly, and maintenance. (R. C73-C106.) Defendants moved to dismiss the amended complaint for failure to state a cause of action (R. C116-C119), arguing, among other grounds, that CAN failed to satisfy Illinois' stringent requirements to bring a malicious prosecution action and that their actions were protected activities under the First Amendment and thus could not serve as the basis for a state law tort claim. (R. C134.) On September 26, 1994, the circuit court (Gillis, J.) dismissed CAN's claims of conspiracy to interfere with right of association and assembly, infringement of right of association and assembly, and maintenance, without leave to replead. (40a-41a.) The court agreed with defendants that the First Amendment protects an organization's provision of assistance and support to its members in bringing antidiscrimination claims and that such actions cannot be made an element of a state law tort action. (41a.) The court also dismissed, with leave to replead, CAN's claim of conspiracy to engage in malicious prosecution. The court found that CAN's complaint failed to meet either Illinois'

favorable termination or special damages requirements necessary to state a cause of action for malicious prosecution. (38a-40a.) In particular, the court warned that "defendants are correct that Malicious Prosecution requires a detailed pleading of Special Damages," which clearly was lacking in the first amended complaint. (40a.)

CAN filed a second amended complaint on October 24, 1994 against petitioners (R. C211-C231), alleging a single count of conspiracy. (R. C227-C230.) The complaint alleges that petitioners conspired with each other and others to engage in malicious prosecution to bring twenty-one underlying lawsuits. (R. C212, C227-C229.) It also alleges that the lawsuits were unfounded and that they were filed for malicious and improper purposes, including to impede and prevent CAN from performing its public education functions, and to bankrupt CAN by forcing it to defend against these suits. (R. C213, C229.) [5/]

[5/] CAN did file a petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois, *see In re Cult Awareness Network, Inc.*, No. 95 B 22133 (N.D. Ill. 1995), which it recently voluntarily converted to a Chapter 7 petition for liquidation. The bankruptcy, however, was not a result of the underlying litigation at issue here. Rather, CAN was forced into bankruptcy because a judgment of $875,000 in compensatory damages and $1,000,000 in punitive damages was recently rendered against it in the United States District Court for the Western District of Washington for instituting the kidnapping and forcible deprogramming of a member of a Christian fundamentalist church in violation of 42 U.S.C. §§ 1985 and 1986. *Scott* v. *Ross*, No. C94-0079C (W.D. Wash., filed Nov. 29, 1995).

In denying CAN's motion for a new trial or remittitur, the district court found "that the evidence sufficiently supports

Petitioners again moved to dismiss CAN's complaint, contending that CAN's complaint still failed to satisfy either Illinois' special damages or favorable termination elements. (R. C240-C259.) Petitioners also again argued that even if they coordinated the underlying cases and provided counsel and assistance to the plaintiffs in challenging a pattern and practice of discrimination, these activities did and could not constitute tortious or unlawful conduct. Petitioners maintained that under the decisions of the Court,[6/] their actions were strictly protected

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the jury's determination that CAN knowingly participated in the decision to abduct Mr. Scott and deprive him of the right to interstate travel. Moreover, the evidence conclusively established that the decision was motivated by a discriminatory animus toward his religious affiliation." *Scott* v. *Ross*, No. C94-0079C, slip op. at 5. The court further concluded "that the reprehensibility of CAN's conduct goes far to justify the amount of the award." *Id.* at 8. Finally, in terms of considerable relevance here, the court criticized CAN's "seeming incapability of appreciating the maliciousness of [its] conduct towards Mr. Scott. Rather, throughout the entire course of this litigation [it has] attempted to portray [itself] as [a] victim of Mr. Scott's counsel's alleged agenda." *Id.* at 14 . (Mr. Scott's counsel was Kendrick Moxon, of Bowles & Moxon, one of the defendants herein.) The court found that CAN's failure to accept responsibility for its unconstitutional acts and its attempt to blame them on Mr. Moxon's "alleged" agenda warranted a large punitive damage award to deter future tortious acts. *Id.*

6/ *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union* v. *State Bar of Michigan*, 401

by the First Amendment and thus could not constitute special damages under Illinois tort law. (R. C247, C305-C306; R. 17-18.)

On May 10, 1995, after argument on petitioners' motion to dismiss, the circuit court (Nowicki, J.)[7/] dismissed the complaint with prejudice on two independent grounds. (R. C355.) First, the court held that CAN had failed to meet Illinois' special injury requirement, rejecting CAN's argument that it had satisfied this requirement by alleging that it was required to defend twenty-one lawsuits brought by twenty-one individuals based upon separate acts of discrimination. (R. 18-19, 27-28.)[8/] The court did not reach petitioners' First Amendment argument because it held that under Illinois law, special injury from multiple litigation exists only where the same plaintiff brings repeated litigation against the same defendant based upon the same acts or cause of action, "which has been finally and conclusively concluded." (R. 19.) Second, the court held that CAN once again had failed to satisfy Illinois' favorable termination requirement, which it understood as requiring an adjudication of facts in the underlying cases. (R. 20-21, 29.) The court offered CAN a fourth opportunity to allege the requisite special damages and to meet Illinois' favorable termination requirement. CAN declined, presumably because it could not so allege in good faith. (R. 23, 30.)

U.S. 576 (1971); *In re Primus*, 436 U.S. 412 (1978).

7/ Judge Gillis had been reassigned to a different part of the court.

8/ As we have noted, many of the twenty-one lawsuits were not brought against CAN, but rather against local CAN affiliates or allied organizations in various localities. (*See, e.g.*, R. C215, C221, C222-C223, C225, C226.)

CAN appealed the circuit court's dismissals of its complaints. In opposing CAN's appeal, petitioners again argued, among other grounds, that even if they coordinated the cases underlying CAN's conspiracy claim and provided counsel and assistance to challenge a pattern and practice of discrimination, such actions were an exercise of their First Amendment rights and thus could not constitute special damages under Illinois malicious prosecution law. (Brief of Defendants-Appellees in the Appellate Court of Illinois, First District at 2, 59-60.) They also maintained that to hold otherwise the court would be required to overrule decisions of the Court.

On March 26, 1996, the Illinois appellate court affirmed the circuit court's orders dismissing CAN's complaint, finding that CAN's allegations failed to satisfy either Illinois' special damages or favorable termination requirements. (19a-34a.) The appellate court held that to state a claim for malicious prosecution based on multiple litigation under Illinois law, the underlying actions must be based on "the same cause of action arising from the same facts" and be "brought by the same plaintiff against the same defendants. . . *after* the [plaintiff] had his day in court and after 'the final and conclusive determination of his rights by this court.'" (30a.) Because the appellate court, like the circuit court, found that the complaint's allegations did not meet these requirements and instead "constitute[d] the ordinary harm generated from any legal actions" (29a), it also did not reach petitioners' First Amendment argument.

CAN appealed to the Supreme Court of Illinois, and on September 18, 1997, the court reversed the judgments of the appellate and circuit courts on two grounds. First, the court relaxed Illinois' favorable termination requirement in malicious prosecution cases, holding that terminations that do not reach the merits of the underlying case may satisfy Illinois' favorable termination requirement in certain circumstances. (10a-12a.)

Second, the court expanded Illinois' definition of special damages. The court held that Illinois' special injury requirement for malicious prosecution cases could be met where a defendant has coordinated and encouraged a series of lawsuits challenging discriminatory practices. (16a-18a.) The court specifically rejected petitioners' argument (*see* Brief of Defendants-Appellees in the Supreme Court of Illinois at 19-21) that such a conclusion would infringe upon their exercise of First Amendment rights and would directly conflict with decisions of the Court holding that litigation activities of a national membership organization, including encouraging, financing, and coordinating a series of lawsuits challenging discriminatory practices, are protected by the First Amendment. (17a-18a.)

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE SUPREME COURT OF ILLINOIS DIRECTLY CONFLICTS WITH DECISIONS OF THE COURT BY DEFINING ILLINOIS' SPECIAL DAMAGES REQUIREMENT FOR MALICIOUS PROSECUTION TO INCLUDE PROTECTED FIRST AMENDMENT ACTIVITY

For more than a century, Illinois has consistently reiterated and adhered to the policy that malicious prosecution actions are highly disfavored in law. *See, e.g., Gorton* v. *Brown*, 27 Ill. 489, 494 (1862); *Shedd* v. *Patterson*, 302 Ill. 355, 359 (1922); *Schwartz* v. *Schwartz*, 366 Ill. 247, 250 (1937); *see also Levin* v. *King*, 271 Ill. App. 3d 728, 730 (1st Dist.), *appeal denied*, 163 Ill. 2d 560 (1995); *Berlin* v. *Nathan*, 64 Ill. App. 3d 940, 945 (1st Dist. 1978), *cert. denied*, 444 U.S. 828 (1979). The Supreme Court of Illinois has explained the reasons for the strong disapproval of the tort: "[C]ourts should

be open to litigants for the settlement of their rights without fear of prosecution for calling upon the courts to determine such rights." *Schwartz,* 366 Ill. at 250. Thus, "even those with evil aims in bringing suit without probable cause are given 'one bite' to do so." *Levin,* 271 Ill. App. 3d at 732 (citation omitted).

To further its policy and to preserve citizens' free and unfettered access to the courts, Illinois has long required that to maintain an action for malicious prosecution a plaintiff must allege special injury or special damages, in addition to showing lack of probable cause and malice, and it strictly construes this requirement.[2/] Illinois first set forth its special damages rule in *Smith* v. *Michigan Buggy Co.*, 175 Ill. 619 (1898), and it has continued to be applied in an unbroken line of cases for the last century.

The purpose of Illinois' policy disfavoring malicious prosecution actions and its special damages requirement is not to reward those with evil aims and no probable cause; rather, it recognizes that the identification of such people is often a difficult and subjective judgment and that the danger of incorrect or inaccurate identification could chill or punish the exercise of protected rights by persons acting without evil aims. As the court in *Berlin* explained:

> The purpose of the special injury rule . . . is to strike a balance between allowing free access to

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[2/] To prevail on a claim for malicious prosecution in Illinois, a plaintiff must show that the defendant brought the underlying suit maliciously and without probable cause; that the former action was terminated in his or her favor; and that he or she sustained special injury or special damage beyond the usual expense, time, or annoyance in defending a lawsuit. *Bank of Lyons* v. *Schultz*, 78 Ill. 2d 235, 239 (1980); *Schwartz*, 366 Ill. at 250-53.

> the courts for the vindication of rights without fear of a resulting suit, and the undue exercise of such right. . . . In order to maintain a free access to the courts by persons with grievances who might otherwise be restrained from seeking redress because of their fear of liability should they fail, the special injury rule has consistently been upheld.
>
> The limitation is sound. When disputes reach the litigious stage, usually some malice is present on both sides. Friendly tort suits are not common. Nor is existence or want of probable cause always easy to determine until the event of the litigation is known. Some margin of safety in asserting rights, though they [may] turn out to be groundless and their assertion accompanied by some degree of ill-will, must be maintained. Otherwise litigation would lead, not to an end of disputing, but to its beginning, and rights violated would go unredressed for fear of the danger of asserting them.

Berlin, 64 Ill. App. 3d at 946-47 (internal quotations and citations omitted).

Thus, in Illinois, even where a civil suit is commenced with malice and "without probable cause," *Smith*, 175 Ill. at 627, there must be a showing of special damages to sustain a claim for malicious prosecution. By imposing such a requirement, Illinois is able to cabin the dangers of unpredictability of jury determinations on the subjective elements of probable cause and malice that the tort of malicious prosecution presents.

To meet Illinois' stringent special damages requirement, a plaintiff generally is required to allege and prove a significant and direct interference with a property or personal liberty

interest, such as arrest under civil process, involuntary confinement, attachment of property, garnishment, or proceedings in bankruptcy. *Schwartz*, 366 Ill. at 250; *Smith*, 175 Ill. at 627. Multiple litigation may also constitute special damages under Illinois law where the same party brings successive suits against the same opponent after "after a party has had his day in court and his right has been conclusively determined." *Shedd*, 302 Ill. at 360; *see also Levin*, 271 Ill. App. 3d at 732. In this case, however, the Supreme Court of Illinois expanded the definition of special damages to include instances where a defendant has encouraged and coordinated a series of lawsuits to be brought to challenge discriminatory practices. (16a-18a.) This Illinois cannot do.

In a long line of cases, the Court has explicitly held that the litigation activities of a national membership organization, including encouraging, financing, coordinating, and even providing counsel for a series of lawsuits challenging discriminatory practices, are protected activities under the First Amendment. *NAACP* v. *Button*, 371 U.S. 415, 438-445 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1, 2-8 (1964); *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222-225 (1967); *United Transp. Union* v. *State Bar of Michigan*, 401 U.S. 576, 580-586 (1971); and *In re Primus*, 436 U.S. 412, 422-432 (1978). The Court has consistently so held to avoid placing such organizations at the mercy of potentially hostile juries and to prevent the chilling of protected freedoms of expression and association. *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). As the Court explained in *United Transp. Union*:

> At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in *NAACP* v. *Button*, *Trainmen*, and *United*

> *Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.

401 U.S. at 585-86. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958), and the "efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." *In re Primus*, 436 U.S. at 431. The First Amendment thus requires "a measure of protection for 'advocating lawful mean of vindicating legal rights,' including 'advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys . . . for assistance.'" *Id.* at 432 (*quoting Button*, 371 U.S. at 437, 434). Illinois' new and expanded definition of special damages directly conflicts with these principles and abridges petitioners' First Amendment rights.

If Illinois did not have a special damages requirement, there would be no First Amendment issue here. The only First Amendment protections afforded a malicious prosecution defendant would be those provided by the Court in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993). However, because of the dangers of the unpredictability of jury determinations regarding lack of probable cause and malice,[10/] Illinois has required that

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[10/] The danger is particularly acute where the actions of political, civil rights, or religious minorities are at issue, such

a plaintiff prove special damages in addition to lack of probable cause and malice. But it has now defined special damages to include the coordination and encouragement of litigation to challenge discriminatory practices, activity protected under the *Button* line of cases. The distinction between tortious and non-tortious conduct under Illinois malicious prosecution law thus can now turn on whether a defendant has engaged in protected speech and associational conduct. Illinois has singled out protected speech and associational conduct as the defining characteristic of tortious activity under Illinois malicious prosecution law.

Such a rule not only unduly burdens and abridges the exercise of protected speech and association, it punishes it. For example, if an individual filed a single antidiscrimination suit that a jury found lacked probable cause and was brought with malice, the individual could not be held liable under Illinois law for malicious prosecution absent proof that the lawsuit significantly and directly interfered with a property or personal liberty interest of the plaintiff. However, if an organization, whether it be the ACLU, the NAACP, the NRA, or the National Family Legal Foundation, encouraged or coordinated a series of individual test cases in various jurisdictions to challenge discriminatory practices and a jury found that these suits were brought without probable cause and with malice, it could be held liable for malicious prosecution in Illinois merely for having exercised its *Button* rights. The very fact of having engaged in protected First Amendment activity is what would turn the organization's activity into tortious and actionable conduct under Illinois law.

Illinois' definition of the special damages element of the tort of malicious prosecution to include the coordination and supporting of litigation to challenge discriminatory practices

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as in *NAACP* v. *Alabama*, and such as here.

thus directly conflicts with the decisions and precedent of the Court, which have strictly protected such activity under the First Amendment, and abridges petitioners' constitutional rights. Where, as here, a state has built in a special protection for defendants in malicious prosecution suits by requiring proof of special damages, it cannot, as Illinois has done, define this element of the tort to include protected First Amendment activity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Illinois should be granted.

Dated: New York, New York
December 16, 1997

Respectfully submitted,

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SUPREME COURT OF ILLINOIS

Docket No. 80868 - Agenda 10 - March 1997.

CULT AWARENESS NETWORK, Appellant, v. CHURCH OF SCIENTOLOGY INTERNATIONAL et al., Appellees.

Filed September 18, 1997.

CHIEF JUSTICE FREEMAN delivered the opinion of the court:

Plaintiff, Cult Awareness Network, filed suit in the circuit court of Cook County against defendants, Church of Scientology International and Church of Scientology of Illinois (collectively, the Church of Scientology), as well as the law firm of Bowles & Moxon. In the complaint, as amended, plaintiff alleged that defendants had engaged in a conspiracy to maliciously prosecute numerous civil actions against plaintiff. The circuit court dismissed the suit for failure to state a cause of action. The court ruled that (i) plaintiff had failed to allege a favorable termination of the underlying actions and (ii) plaintiff had not satisfied the special damage requirement for actions sounding in malicious prosecution. The appellate court affirmed the order of dismissal (279 Ill. App. 3d 66), and we allowed plaintiff's petition for leave to appeal (155 Ill. 2d R. 315(a)). For the reasons that follow, we reverse the judgments of the appellate and circuit courts and remand the matter to the circuit court for further proceedings.

BACKGROUND

Because the circuit court dismissed this action pursuant to section 2-615 of the Code of Civil Procedure, we must take the factually sufficient allegations contained in plaintiff's complaint as true. See *Doe v. Calumet City*, 161 Ill. 2d 374, 381 (1994). Those allegations may be summarized in the following manner.

Plaintiff is a not-for profit corporation engaged in, among other things, educating the public with respect to religious rights, freedoms, and responsibilities. Defendants are

two religious corporations and their attorneys. Plaintiff claimed that defendants conspired with each other to carry on a campaign of malicious prosecution for the express purpose of causing plaintiff's bankruptcy and eventual disbandment. Specifically, plaintiff alleged that, between January 24, 1992, and July 1, 1993, various members of the Church of Scientology filed 21 lawsuits which named plaintiff as the defendant.[1] Plaintiff further alleged that the lawsuits were filed in several jurisdictions around the country, including Illinois, California, Massachusetts, Minnesota, New York, and Washington, D.C. All but one of the suits alleged that plaintiff had violated various state and federal civil rights laws by denying each complainant membership in plaintiff's organization and/or access to its meetings. The lone cause of action that did not contain such allegations was filed by a church member who claimed that plaintiff had fraudulently induced him to do volunteer work. Each of the underlying suits was alleged to have terminated in plaintiff's favor, either by summary judgment or by voluntary and involuntary dismissals.

After setting forth the details of the underlying suits, plaintiff further alleged that the filing of each of the lawsuits constituted a "separate overt act" in furtherance of the alleged conspiracy. In particular, plaintiff claimed that the Church of Scientology "suggested, instigated, encouraged, and assisted the

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[1] We note that plaintiff has stated in its brief that 24 separate suits were filed during this period. Moreover, the appellate court opinion also referred to plaintiff's allegations regarding 24 different actions. 279 Ill. App. 3d at 70. Nevertheless, our review of plaintiff's complaint reveals that in one of the actions, identified in the complaint as the "Ward et al. Lawsuits," four different church members were named as joint plaintiffs in a single suit. Therefore, only 21 lawsuits were actually referenced in plaintiff's complaint.

named plaintiffs in the [underlying] lawsuits and complaints." Plaintiff also alleged that Bowles & Moxon provided assistance and support to the Church of Scientology in each of the underlying lawsuits. According to plaintiff, each of those actions was filed without probable cause. Finally, plaintiff claimed that it had suffered damages as a result of the "multiplicity of actions brought by, at the behest of, or with the assistance of defendants." For example, plaintiff alleged that it had incurred substantial attorney fees and increased costs for liability insurance, among other things.

Defendants thereafter filed a motion to dismiss the complaint with prejudice for failure to state a cause of action. In support of their motion, defendants argued that none of the underlying suits had ended in a judicial termination that dealt with the factual issues of the case, and thus plaintiff had failed to allege that the actions had terminated in its favor as required under Illinois law. Moreover, defendants claimed that plaintiff had failed to satisfy Illinois' special injury requirement. In their view, the damages alleged by plaintiff constituted nothing more than the usual costs and anxiety associated with defending against an ordinary civil action. The circuit court agreed with both points and granted the motion to dismiss.

As previously noted, the appellate court affirmed the judgment of the circuit court. Although the court acknowledged that plaintiff had alleged that each of the underlying suits was terminated in its favor, either by summary judgment or by dismissal (both voluntary and involuntary), the court nevertheless held that such allegations were insufficient to satisfy the favorable termination requirement as that term had been defined in previous appellate court opinions. The court noted that, under Illinois law, "' [a] favorable termination for purposes of a malicious prosecution claim is one which deals with the *factual* issue or issues of a case.' (Emphasis added.)" 279 Ill. App. 3d at 70, quoting *Bismarck Hotel Co. v. Sutherland*, 175 Ill. App. 3d 739, 748 (1988). Plaintiff's

allegations, however, failed to indicate that the factual issues in the underlying actions had been adjudicated in plaintiff's favor. 279 Ill. App. 3d at 70. In addition, the appellate court held that plaintiff's allegations for damages did not satisfy the special injury requirement. Rather, the allegations merely constituted "the ordinary harm generated from any legal actions." 279 Ill. App. 3d at 72. Finally, the court rejected plaintiff's contention that the special damage requirement was satisfied by the multiple number of underlying suits at issue in this case. 279 Ill. App. 3d at 70.

ANALYSIS

The dispositive issue for our review is whether plaintiff has alleged sufficient facts to support a cause of action for civil conspiracy. However, because such an action necessarily depends upon the commission of some underlying tort (see *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 63 (1994); *Bonney v. King*, 201 Ill. 47, 50 (1903)), the viability of plaintiff's complaint in this case turns upon whether plaintiff has alleged enough facts to satisfy the elements of malicious prosecution. Therefore, it is appropriate that we examine those elements in determining the adequacy of plaintiff's charge.

In Illinois, the elements of malicious prosecution are well established. The plaintiff must show that the defendant brought the underlying suit maliciously and without probable cause. Moreover, the plaintiff must establish that the former action was terminated in his or her favor. Finally, the plaintiff must plead and prove some "special injury" or special damage beyond the usual expense, time or annoyance in defending a lawsuit. *Bank of Lyons v. Schultz*, 78 Ill. 2d 235, 239 (1980); *Schwartz v. Schwartz*, 366 Ill. 247, 250-53 (1937). In the present case, the parties dispute whether plaintiff has satisfactorily pleaded (i) the requisite favorable termination of the underlying suits and (ii) a special injury. We address each in turn.

Favorable Termination

The necessity of alleging a favorable termination in actions for malicious prosecution is a long-standing and deeply rooted principle in this court's jurisprudence. Indeed, as early as 1832, this court concluded that the former proceeding must have been legally determined in favor of the malicious prosecution plaintiff before the malicious prosecution action will lie. *Feazle v. Simpson*, 2 Ill. 30 (1832). Although this court has, over the years, consistently acknowledged the requirement (see *Bank of Lyons*, 78 Ill. 2d at 239; *Schwartz*, 366 Ill. at 250; *Shedd v. Patterson*, 302 Ill. 355, 359 (1922); *Bonney*, 201 Ill. at 50; *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 629 (1898)), it has not had the occasion to identify, with any precision, the types of judicial determinations which constitute a "favorable termination" for purposes of malicious prosecution suits. As a result, the contours of the requirement have been shaped by our appellate court, which in 1970, announced that the favorable termination requirement could be satisfied only by "a judgment which deals with the *factual* issue of the case, whether the judgment be rendered after a trial or upon motion for summary judgment." (Emphasis added.) *Siegel v. City of Chicago*, 127 Ill. App. 2d 84, 108 (1970). Since that time, this holding has been relied upon without any detailed analysis, by numerous appellate court decisions, including that which we review today. See, *e.g., Kurek v. Kavanagh, Scully, Sudow, White & Frederick*, 50 Ill. App. 3d 1033, 1038 (1977); *Executive Commercial Services, Ltd. v. Daskalakis*, 74 Ill. App. 3d 760, 767 (1979); *Savage v. Seed*, 81 Ill. App. 3d 744, 749 (1980); *Smith v. Aaron, Aaron, Schimberg & Hess*, 112 Ill. App. 3d 653, 657 (1983); *Sutton v. Hofeld*, 118 Ill. App. 3d 65, 68 (1983); *Arora v. Chui*, 279 Ill. App. 3d 321, 329 (1996). Therefore, the propriety of the appellate court's action in this case is largely dependent upon the correctness of *Siegel* and it [*sic*] progeny.

In *Siegel*, the owners of certain property filed a

multicount complaint for declaratory relief against the City of Chicago. In the complaint, plaintiffs sought to nullify a zoning amendment that would have permitted another defendant, Stein, to erect a high-rise apartment building near plaintiffs' properties. Stein filed a counterclaim, alleging that one of the counts in plaintiffs' complaint was filed without probable cause and with malice, thereby constituting malicious prosecution. The circuit court, however, had previously dismissed the count which had given rise to Stein's counterclaim, and, as result, dismissed Stein's counterclaim as well. The court ruled that the dismissal of plaintiffs' count could not be viewed as a favorable termination for purposes of Stein's malicious prosecution action. Stein appealed the ruling.

The appellate court affirmed the judgment of the circuit court, holding that a dismissal of the former action could not qualify as a favorable termination in the context of a malicious prosecution suit. The court predicated its holding on the fact that the favorable termination requirement "goes to the question of probable cause." *Siegel*, 127 Ill. App. 2d at 107. As a result, the court reasoned that

> "the legal termination requirement necessitate[d] a judgment which deals with the *factual issue of the case*, whether the judgment be rendered after a trial or upon motion for summary judgment. However, it is not sufficient to simply obtain a dismissal of the opponents' complaint, for such dismissal need bear no logical relationship to the legitimacy of the assertions contained therein; therefore, such dismissal lends no credence to the claim that the assertions were baseless." (Emphasis added.) *Siegel*, 127 Ill. App. 2d at 108.

Consonant with this conclusion, the appellate court affirmed the dismissal of Stein's counterclaim.

As noted above, the *Siegel* analysis has, throughout the years, been relied upon by different panels of our appellate court, including the one which affirmed the circuit court's

judgment in this case. We note that several of these later appellate court opinions state that voluntary dismissals do not satisfy the favorable termination requirement and cite this court's decision in *Bonney* as authority for that proposition. See *Kurek*, 50 Ill. App. 3d at 1038; *Withall v. Capitol Federal Savings of America*, 164 Ill. App. 3d 851, 856 (1987). The *Siegel* court, however, did not rely on any of this court's opinions in formulating its analysis with respect to the favorable termination requirement. Moreover, a close reading of the *Bonney* decision reveals that the malicious prosecution plaintiff failed to allege that the underlying action claimed to have been wrongfully brought was ever "legally terminated." *Bonney*, 201 Ill. at 50. We stress that this court, in *Bonney*, never intimated, in any way, that voluntary dismissals did not satisfy the favorable termination requirement, and those appellate court decisions which so hold are simply incorrect as to this point.

Notwithstanding the above, defendants regard the appellate court's interpretation of the favorable termination requirement as a reasonable means of limiting a cause of action which has long been disfavored at law. They maintain that the *Siegel* holding finds support in this court's previous opinions which have recognized that actions for malicious prosecution inhibit the free access of the courts. In their view, a more expansive interpretation of the favorable termination requirement would lead litigants to fear subsequent prosecution simply for "calling upon the courts to determine [their] rights." Plaintiff, on the other hand, asks this court to overrule this line of cases, claiming that the appellate court has been overly restrictive in its interpretation of the favorable termination requirement. In support of its position, plaintiff points out that the holding in *Siegel* and its progeny conflicts with the views of many courts in other jurisdictions and the views of most modern commentators. As a result, although the tort of malicious prosecution is recognized in Illinois, plaintiffs

believe that the holding in *Siegel* has led to the virtual eradication of the cause of action in this state. Although we are not unmindful of the concerns raised by defendants, we agree with plaintiff that our appellate court's interpretation of the favorable termination requirement is at odds with modern tort law.

We begin our review of this issue with a discussion of the Restatement (Second) of Torts, which suggests looking beyond the type of disposition that was obtained in the previous action when determining if that termination is, indeed, "favorable" for purposes of a malicious prosecution action. Specifically, the Restatement provides as follows:

> "*Termination in favor of the person against whom civil proceedings are brought.* Civil proceedings may be terminated in favor of the person against whom they are brought *** by (1) the favorable adjudication of the claim by a competent tribunal, or (2) the withdrawal of the proceedings by the person bringing them, or (3) the dismissal of the proceedings because of his failure to prosecute them. A favorable adjudication may be by a judgment rendered by a court after trial, or upon demurrer or its equivalent. In either case the adjudication is a sufficient termination of the proceedings, unless an appeal is taken. ***
>
> Whether a withdrawal or an abandonment constitutes a final termination of the case in favor of the person against whom the proceedings are brought and whether the withdrawal is evidence of a lack of probable cause for their initiation, *depends upon the circumstances under which the proceedings are withdrawn.*" (Emphasis added.) Restatement (Second) of Torts §674, Comment *j* (1977).

Unlike the holding in *Siegel*, the Restatement approach, which has been expressly adopted by various courts across the nation (see, *e.g., Barrett Mobile Home Transport, Inc. v. McGuire*,

530 So. 2d 730, 735-36 (Ala. 1988); *Frey v. Stoneman*, 150 Ariz. 106, 110-11, 722 P.2d 274, 278-79 (1986); *Nelson v. Miller*, 233 Kan. 122, 125-26, 660 P.2d 1361, 1363-65 (1983); *Christian v. Lapidus*, 833 S.W.2d 71, 74 (Tenn. 1992)), allows dispositions which do not reach the merits of the underlying case to satisfy the favorable termination requirement in certain circumstances. Under this approach, whether or not the requirement is met is to be determined not by the *form* or *title* given to the disposition of the prior proceeding, but by the *circumstances* under which that disposition is obtained. In addition to the above cases, we note that other courts, while not expressly referring to the Restatement by name, have followed its approach. See *Abbott v. United Venture Capital, Inc.*, 718 F. Supp. 828, 833 (D. Nev. 1989) (compiling cases). Like those courts which have expressly adopted the Restatement, these courts also recognize that the existence of a favorable termination turns upon the *circumstances* under which the disposition is obtained. See *Weaver v. Superior Court*, 95 Cal. App. 3d 166, 184-85, 156 Cal. Rptr. 745, 755-56 (1979); *Wong v. Tabor*, 422 N.E.2d 1279, 1284-85 (Ind. App. 1981). As a result, terminations which do not rise to the level of adjudications on the merits may satisfy the favorable termination requirement. See, *e.g.*, 52 Am. Jur. 2d *Malicious Prosecution* §42 (1970). For example, if the dismissal was merely a formal means of securing a negotiated settlement, it cannot serve as the basis for a malicious prosecution action. See *Barrett Mobile Home Transport*, 530 So. 2d at 735-36. See also *Wong v. Tabor*, 422 N.E.2d 1279, 1284-85 (Ind. App. 1981) (same). Likewise, a malicious prosecution claim cannot be premised on a dismissal that was entered in order to enable the plaintiff to file the claim in another forum. See *Ramsey v. Leath*, 706 F.2d 1166, 1170-71 (11th Cir. 1983). Conversely, an involuntary dismissal resulting from plaintiff's failure to comply with discovery serves as a favorable termination due to the fact that a party who fails to produce evidence, in essence,

fails to prosecute. See *Lumpkin v. Friedman*, 131 Cal. App. 3d 450, 182 Cal. Rptr. 378 (1982); see also *Nagy v. McBurney*, 120 R.I. 925, 392 A.2d 365 (1978) (holding that involuntary dismissal for failure to file court-ordered bill of particulars constitutes favorable termination).

We agree with the reasoning espoused by the courts of our sister states. We regard the Restatement's treatment of the favorable termination requirement as more balanced than our appellate court's interpretation as set forth in *Siegel*. Nevertheless, defendants criticize the Restatement approach as being too sweeping in its scope. We disagree. Contrary to defendants' arguments, we do not necessarily view the Restatement's position, as expressed in the case law, as more expansive than our appellate court's interpretation. As the case law demonstrates, a favorable termination is limited to only those legal dispositions that can give rise to an inference of lack of probable cause. See also 54 C.J.S. *Malicious Prosecution* §54 (1987) (dismissal cannot serve as favorable termination if based solely on technical or procedural grounds). This, of course, was one of the goals of the *Siegel* court. See *Siegel*, 127 Ill. App. 2d at 107 (acknowledging that even if the malicious prosecution plaintiff has obtained a favorable termination in the underlying action, it "does not follow that [the underlying action had been] initiated without foundation"). Unlike *Siegel*, however, the analysis set forth in the Restatement contemplates that certain dispositions, although not obtained on the merits of the underlying facts, may under certain circumstances give rise to an inference of a lack of probable cause. In contrast, the *Siegel* rule has the unfortunate consequence of allowing those who utilize our courts for wrongful purposes to do so with impunity so long as they obtain a nonfactual disposition of the action. Under this approach, a disingenuous plaintiff can merely nonsuit his or her frivolous lawsuit in order to guard against a future malicious prosecution action. See *Arora*, 279 Ill. App.3d at 336 (McLaren, J., dissenting); see also *Marbourg*

v. Smith, 11 Kan. 554, 562-63 (1873) (recognizing, as early as 1873, the problems inherent in allowing a plaintiff to avoid a malicious prosecution action by nonsuit). In our view, the Restatement's position best balances the right of citizens to have free access to our courts and the right of the individual to be free from being haled into court without reason, thereby better serving the interests of justice.

Defendants also maintain that the existence of our Rule 137 provides an additional reason for this court not to depart from the appellate court's interpretation of the favorable termination requirement. They submit that the rule provides an adequate remedy for suits not well grounded in law or in fact. We must summarily reject this argument. Although Rule 137 was adopted as a means of preventing false and frivolous filings, it was not meant to preempt our existing tort law. The courts of this state have recognized, both before and after the adoption of Rule 137, the viability of a cause of action sounding in malicious prosecution.

In addition, our decision to follow the Restatement view on this issue is consistent with our recent opinion in *Swick v. Liautaud*, 169 Ill. 2d 504, 513 (1996). In *Swick*, we addressed whether a *nolle prosequi* was a favorable termination in the context of malicious prosecution of an underlying criminal action. This court, without dissent, adopted the Restatement's approach to the question and held that a *nolle prosequi* may serve as a favorable termination unless the prosecution was abandoned for reasons not indicative of the innocence of the accused. *Swick*, 169 Ill. 2d at 513. Indeed, we stressed that it was the *circumstances* surrounding the entry of the *nolle prosequi* that must be examined and not the mere form or title of the disposition. *Swick*, 169 Ill. 2d at 513-14. We today provide similar guidelines for malicious prosecution suits which are predicated upon prior *civil* proceedings.

Having adopted the Restatement approach, we find that plaintiff's complaint in this case, which alleges that each of the

underlying actions were terminated in its favor either by the entry of summary judgment or by dismissal (voluntary and involuntary), satisfies the favorable termination requirement, at least for purposes of defendant's motion to dismiss under section 2-615. Whether or not these dispositions ultimately *are proved by plaintiff* to be indicative of a lack of probable cause remains a question of fact which cannot be answered at this stage of the litigation. See *Swick*, 169 Ill. 2d at 514 (recognizing that at trial, plaintiff must adduce evidence to meet its burden of proof that the prior proceedings were terminated under circumstances indicative of plaintiff's innocence). See also *Nelson*, 233 Kan. at 125-26, 660 P.2d at 1364; *Abbott*, 718 F. Supp. at 834.

Accordingly, the circuit court erred in ruling that plaintiff had failed to sufficiently allege the favorable termination of the underlying actions at issue.

Special Damage or Injury

We must next determine whether plaintiff's complaint adequately pleaded special injury or damage. Like the favorable termination requirement, the necessity of pleading some special injury or damage is firmly rooted in our jurisprudence. In one of the earliest references to the requirement, this court, in 1898, examined whether damages can be recovered for the malicious prosecution of an "ordinary civil suit, begun by personal service of process, and unaccompanied either by an arrest of the person or by seizure of property." *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 624 (1898). The underlying suit in question in *Smith* was an unsuccessful action for fraudulent misrepresentation brought by an employer against one its salesman. Citing both American and English common law principles, this court determined that without the arrest of the person or the seizure of the person's property or some "other special injury," a cause of action for the malicious prosecution would not lie in civil actions. *Smith*, 175 Ill. at 627. In reaching this conclusion, the

court stressed its decision was grounded upon the fact that the courts are open to every citizen to claim what "he deems to be his right without fear of being prosecuted for heavy damages." *Smith*, 175 Ill. at 628. Thus, the ordinary trouble and expense which arise from "*ordinary forms of legal controversy*, should be endured by the law-abiding citizen as one of the inevitable burdens, which men must sustain under civil government." (Emphasis added.) *Smith*, 175 Ill. at 629.

The issue of what type of lawsuit constitutes an "ordinary form of legal controversy" was again addressed by this court some 22 years later in *Norin v. Scheldt Manufacturing Co.*, 297 Ill. 521 (1921). There, the Scheldt Manufacturing Company filed a petition in bankruptcy against Norin, requesting that Norin be adjudged a bankrupt. Scheldt filed the petition on publication alone. When Norin failed to appear in the proceeding, the court entered a bankruptcy judgment against him. Norin later learned of the bankruptcy action and began *vacatur* proceedings. During the hearing to set aside the default, one of Scheldt's officers admitted he had known Norin's place of residence at the time service by publication was obtained. Moreover, Scheldt admitted that it had been unable to prove Norin's insolvency at the time it filed its petition. Accordingly, the court vacated its previous judgment and dismissed the bankruptcy petition. Norin thereafter brought suit against Scheldt to recover damages for the malicious prosecution of the bankruptcy action. Scheldt contended that Norin had failed to satisfy the special injury requirement because (i) the bankruptcy judgment had ultimately been vacated, and (ii) Norin's property had not been seized. Scheldt concluded therefore that the bankruptcy litigation constituted a mere "ordinary" civil action. On appeal, this court rejected that argument. In doing so, we concluded that the bankruptcy action could not be considered ordinary because of the "far-reaching and drastic" effects associated with that proceeding. *Norin*, 297 Ill. at 525. In fact, because of the

peculiar, *sui generis* nature of a bankruptcy action, this court deemed irrelevant the fact that Norin's property was not seized. We explained that suits "which are themselves unusual in their effect upon the defendant" fall outside the special injury requirement established in *Smith. Norin*, 297 Ill. at 527.

Subsequently, in *Shedd v. Patterson*, 302 Ill. 355 (1922), this court had further opportunity to shape the contours of the special injury requirement. In that case, the plaintiff brought a malicious prosecution action against defendant after the defendant had filed nine successive lawsuits against plaintiff, all of which related to the foreclosure of a leasehold estate for unpaid rents. The circuit court dismissed the action, and the appellate court affirmed. The appellate court ruled that under this court's decisions in *Smith and Norin*, the nine unsuccessful prior actions constituted "ordinary" litigation; therefore, plaintiff had not suffered any special injury. This court thereafter granted plaintiff leave to appeal and reversed the judgment of the appellate court. Although this court initially acknowledged that the Illinois courts are open to all litigants for the settlement of their rights without fear of retributive litigation, it nevertheless held that *Smith and Norin* could not be viewed as providing immunity in the case of successive suits after a party has had his or her rights finally adjudicated. *Shedd*, 302 Ill. at 360. Specifically the court stated that after a party has "had his day in court and his right has been conclusively determined," he may not return to court to "harass" the same opponent about the same issues. *Shedd*, 302 Ill. at 360.

It is against this precedential backdrop, and, in particular, *Shedd*, that we must examine whether the special injury rule has been satisfied by the facts as alleged in this case. Defendants maintain that although multiple suits are involved here, the instant case is distinguishable from *Shedd* because each of the prior actions here were brought by different plaintiffs in different jurisdictions, concerning different sets of operative facts. Defendants also point out that each of the prior

actions in *Shedd*, unlike those here, were filed successively after the first action had been finally and conclusively determined. Plaintiff, on the other hand, acknowledges the dissimilarities between the cases, but nevertheless submits that the principles concerning multiple suits announced in *Shedd* apply with equal force to the case at bar. Plaintiff contends that the filing of 21 meritless lawsuits against plaintiff during a 17-month period constitutes a special injury regardless of the fact that the suits were filed concurrently rather than consecutively. Plaintiff submits, therefore, that it should be allowed a remedy for this harm.

We agree with defendants that *Shedd* is factually distinguishable from the case at bar. In *Shedd*, this court was confronted with a single litigant who, having invoked the power of the judiciary to decide his grievance and having lost, refused to accept the judgment of the court and continued to litigate the matter. This court would not permit the court system to be used in such a manner, and thus it stated in pertinent part:

> "Law is the foundation of civil government, and its administration and the means for its enforcement are essential to the maintenance of rights and the stability of the social order. To that end courts are created and maintained at the public expense, and are, and should be, open for the redress of grievances and the enforcement of rights, but that affords no reason for requiring them to employ their time to the prejudice of other litigants and the public business, to enable a party whose rights have been finally and conclusively determined to harass the same party about the same thing. *** In this case the courts had repeatedly decided that the defendant had no grievance, and the substantial questions involved were finally and conclusively settled [15 years earlier] in *Patterson v. Northern Trust Co.*, 231 Ill. 22." *Shedd*, 302 Ill. at 360-61.

Clearly, what concerned this court in *Shedd*, to a large extent,

was the fact that a litigant who had already been given his day in court, and had lost, continued to use the same purported grievance as a subterfuge for conducting a personal crusade of harassment under the guise of rightful litigation. In this case, however, the same plaintiff is not involved in repeated litigation and the multiple suits in question were not filed successively but concurrently. Therefore, *Shedd* is factually inapposite to the case at bar.

Nevertheless, the fact that *Shedd* is not factually on all fours with the present case does not spell victory for defendants. A common theme with respect to the special injury rule which runs throughout all of this court's opinions on the subject, including *Shedd*, is this court's recognition of its responsibility to maintain a proper balance between the societal interest in preventing harassing suits and in permitting the honest assertion of rights in our court rooms. See *Shedd*, 302 Ill. at 360. As our case law amply demonstrates, it is this balance which lies at the heart of the special injury rule (see *Smith*, 175 Ill. at 628-29; *Norin*, 297 Ill. at 526-27; see also *Friedman v. Dozorc*, 412 Mich. 1, 67, 312 N.W.2d 585, 612 (1981) (Coleman, C.J., dissenting in part and concurring in part); Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 Yale L.J. 1218, 1230 (1979)), and it is this balance, and not the facts in *Shedd*, which ultimately must determine the propriety of the instant action. Ironically, it is one of the critical differences between the facts in *Shedd* and the facts as alleged in this case which compels the conclusion that this delicate balance has been upset in this case. In contrast to *Shedd*, which involved only two litigants disputing the foreclosure of a leasehold estate, the present case involves allegations that a large national corporation improperly induced its members to engage in a national campaign of simultaneous malicious prosecution. Plaintiff has alleged that the Church of Scientology instituted the simultaneous suits, not to resolve any legal dispute between

the parties, but to keep plaintiff from engaging in its business of disseminating information regarding religious freedom. The invidiousness of the alleged conspiracy is best reflected in the fact that plaintiff was sued 21 times over the course of a 17-month period in jurisdictions ranging from New York to California. Such a sustained onslaught of litigation can hardly be deemed "ordinary" if plaintiff can prove that the actions were brought without probable cause and with malice. In view of these circumstances, we believe that plaintiff has set forth facts, which if proved true, satisfy our special injury rule.

Notwithstanding the above, defendants submit that if this court were to conclude that the special injury requirement has been met in this case, we would be infringing upon defendants' exercise of their first amendment rights. Specifically, defendants rely upon several United States Supreme Court decisions which have held that the litigation activities of a national membership organization, including encouraging, financing, and coordinating a series of lawsuits challenging discriminatory practices, are protected by the first amendment. See *National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963); *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967). While we do not dispute the correctness of these Supreme Court decisions, we do dispute the defendants' reliance upon them. The Constitution affords protection to the *honest* litigator in search of resolutions to *true* legal disputes; however, it does not provide the right to any individual to assist another, with money or otherwise, in the prosecution of a suit which has been filed with malice and without probable cause. In any event, we stress that defendants have challenged plaintiff's complaint by way of a section 2-615 motion to dismiss. Such a motion merely addresses the allegations contained within the four corners of plaintiff's complaint. Therefore, defendants' constitutional argument, which is a

fact-dependent defense to the action grounded in probable cause, cannot be considered in the context of the present motion to dismiss. Nothing in our opinion prevents defendants from raising the first amendment's protections at the appropriate juncture in this case.

As a final matter, we wish to stress that our holding with respect to the special injury requirement should not be viewed as a rejection of the rule as set forth in our earlier opinions. We further emphasize that today's decision should not be read to mitigate the strict requirement that a malicious prosecution plaintiff show not only that the action complained of has been terminated, but that it was commenced maliciously and without probable cause. These latter two required elements are no easy hurdle for a plaintiff, as many courts and commentators have noted. See *Barrett*, 530 So. 2d at 735-36; *Friedman*, 412 Mich. at 65-66, 312 N.W.2d at 611 (Coleman, C.J., dissenting in part and concurring in part); *Kaufman v. Shefman*, 169 Mich. App. 829, 840, 426 N.W.2d 819, 824 (1988); Restatement (Second) of Torts §675, Comments *a* through *d* (1976). An action for malicious prosecution remains one that is disfavored in law.

CONCLUSION

In view of the foregoing analysis, we hold that plaintiff has sufficiently alleged the elements of the tort of malicious prosecution and, for purposes of this case, the tort of civil conspiracy to commit malicious prosecution. The circuit court, therefore, erred in dismissing the amended complaint. Accordingly, we reverse the judgments of the appellate and circuit courts, and remand the matter to the circuit court for further proceedings consistent with this opinion.

Judgments reversed;
cause remanded.

JUSTICE McMORROW took no part in the consideration or decision of this case.

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT
THIRD DIVISION
March 29, 1996

No. 1-95-1842

CULT AWARENESS NETWORK,	) Appeal from the
	) Circuit Court of
Plaintiff-Appellant,	) Cook County
	)
v.	)
	)
CHURCH OF SCIENTOLOGY	)
INTERNATIONAL,	)
BOWLES & MOXON, and	) Honorable
CHURCH OF	) Kenneth L. Gillis and
SCIENTOLOGY OF ILLINOIS,	) Julia M. Nowicki,
	) Judges Presiding.
Defendants-Appellees.	)

JUSTICE GREIMAN delivered the opinion of the court:

Plaintiff Cult Awareness Network appeals the trial court's dismissal with prejudice of its one-count second amended complaint alleging a cause of action for conspiracy to engage in malicious prosection [*sic*] against defendants Church of Scientology International, Bowles & Moxon, and Church of

Scientology of Illinois.

On appeal plaintiff asserts that the trial court erred in dismissing plaintiff's complaint for failure to state a cause of action for conspiracy to engage in malicious prosecution and that this court should consider whether the complaint states a cause of action for abuse of process even though plaintiff failed to raise such cause of action until this appeal.

We affirm the dismissal of plaintiff's complaint and find that plaintiff waived its abuse of process claim.

In January 1994 plaintiff first filed a five-count complaint against the currently named defendants and 11 individual members of the Church of Scientology. The complaint alleged (1) conspiracy to engage in malicious prosecution; (2) malicious prosecution; (3) conspiracy to interfere with right of assembly and association; (4) infringement of right of association and assembly; and (5) maintenance. After defendants filed a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 1992)), plaintiff voluntarily

withdrew its complaint.

Thereafter, on June 8, 1994, plaintiff filed a four-count first amended complaint against the same defendants named in the original complaint. Unlike the original complaint, the first amended complaint did not include a cause of action for malicious prosecution. Similar to the original complaint, however, the first amended complaint alleged (1) conspiracy to engage in malicious prosecution, (2) conspiracy to interfere with right of association and assembly, (3) infringement of right of association, and (4) maintenance. On August 4, 1994, defendants filed a motion to dismiss pursuant to section 2-615(b) and (e). Thereafter, the trial court dismissed the first amended complaint with leave to replead only the count alleging conspiracy to commit malicious prosecution as to certain specified underlying prosecutions.

On October 24, 1994, plaintiff filed its one-count second amended complaint, which is now at issue, alleging only conspiracy to engage in malicious prosecution. Plaintiff

alleged that defendants conspired with each other to file at least 24 unfounded lawsuits against plaintiff. The 24 lawsuits were filed in various State and Federal courts in six or seven jurisdictions across the United States. With only one exception, the essential claim in all the lawsuits was that plaintiff unlawfully denied access to the various complainants who were associated with scientology. The one exception was a lawsuit filed by Jonathan Nordquist in which he alleged that plaintiff had fraudulently induced him to do volunteer work for plaintiff.

On December 14, 1994, defendants filed a motion to dismiss with prejudice for failure to state a cause of action pursuant to section 2-615(b).

Following a hearing on May 10, 1995, the trial court dismissed the complaint with prejudice when plaintiff informed the trial court that it did not wish to replead.

On appeal, plaintiff asserts that the requirements for a malicious prosecution claim are satisfied in the allegations in its complaint. Plaintiff primarily argues that the multiple

underlying lawsuits distinguish its cause of action from cases which involved only a single underlying lawsuit.

Defendants contend that plaintiff's complaint failed to state a claim for malicious prosecution because it failed to make the required factual allegations to satisfy the favorable termination requirement and failed to allege special damages as required under Illinois law.

This court applies a de novo standard of review where a complaint is dismissed pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1992)). (Majumdar v. Lurie, 274 Ill. App. 3d 267, 268, 653 N.E.2d 915 (1995).) To determine whether the plaintiff has stated a cause of action upon which relief could be granted, this court must accept as true all well-pled facts in its complaint and must draw all reasonable inferences from those facts which are favorable to the plaintiff. (Majumdar, 274 Ill. App. 3d at 268.) This court, however, does not accept as true any conclusions of law or fact contained within the complaint which are unsupported by

allegations of specific facts upon which those conclusions rest. Majumdar, 274 Ill. App. 3d at 268 (reversed the dismissal of the complaint).

To sustain an action for malicious prosecution based on a civil lawsuit, a plaintiff must allege facts sufficient to show that: (1) the lawsuit which plaintiff claims was wrongfully filed was terminated in his favor; (2) the wrongfully-filed lawsuit was brought maliciously and without probable cause; and (3) the plaintiff suffered some special injury or special damage beyond the usual expense, time, annoyance or inconvenience in defending a lawsuit. Bank of Lyons v. Schultz, 78 Ill. 2d 235, 239, 399 N.E.2d 1286 (1980); Levin v. King, 271 Ill. App. 3d 728, 730, 648 N.E.2d 1108 (1995) (plaintiff failed to plead special damages).

Regarding the first element, the instant complaint alleges that the 24 lawsuits underlying plaintiff's malicious prosecution claim were variously ended by summary judgments, motions to dismiss, dismissals with prejudice and

voluntary dismissals.

Neither voluntary nor involuntary dismissals satisfy the favorable termination element. (Bismarck Hotel Co. v. Sutherland, 175 Ill. App. 3d 739, 748, 529 N.E.2d 1091 (1988) (Bismarck Hotel II) (and cases cited therein).) "A favorable termination for purposes of a malicious prosecution claim is one which deals with the factual issue or issues of a case." (Emphasis added.) (Bismarck Hotel II, 175 Ill. App. 3d at 748; Siegel v. City of Chicago, 127 Ill. App. 2d 84, 108, 261 N.E.2d 802 (1970).) This rule obtains even though such dismissals may constitute adjudications on the merits under Supreme Court Rule 273. Bismarck Hotel II, 175 Ill. App. 3d at 748; 134 Ill. 2d R. 273.

In Bismarck Hotel II the plaintiff-landlord had filed three forcible entry and detainer actions against the defendant-tenant. (Bismarck Hotel II, 175 Ill. App. 3d 739.) In the first forcible entry and detainer action, the trial court granted the plaintiff-landlord's motion for summary judgment and denied

the defendant-tenant's same motion. On appeal in the first action, this court reversed the summary judgment entered in favor of the plaintiff and entered summary judgment in favor of the defendant as to defendant's right to possession of the premises as a month-to-month tenant. Bismarck Hotel Co. v. Sutherland, 92 Ill. App. 3d 167, 175, 415 N.E.2d 517 (1980) (Bismarck Hotel I).

Thereafter, a second forcible entry and detainer action was dismissed by the circuit court as premature. The plaintiff's third forcible entry and detainer action, which went through a bench trial, was on appeal in the Bismarck Hotel II case. In the plaintiff's third lawsuit, the defendant filed a counterclaim including a count alleging malicious use of process which the trial court struck. On appeal, this court held that the "plaintiff's first forcible entry and detainer action for possession of the demised premises terminated in defendant's favor" for purposes of malicious prosecution. Bismarck Hotel II, 175 Ill. App. 3d at 748.

From Bismarck Hotel II, the present plaintiff argues that, at a minimum, the eight lawsuits which resulted in summary judgment for plaintiff should suffice to satisfy the favorable termination element for its malicious prosecution claim. We disagree.

The summary judgment which was held to suffice for purposes of the favorable termination element in Bismarck Hotel II was entered in favor of the defendant on appeal in Bismarck Hotel I where this court discussed the case in detail and made factual findings favorable to him. In contrast, the present complaint includes no allegations that actual favorable findings were made and instead relies on the mere entry of the summary judgment orders in its favor. A mere grant of summary judgment without more does not necessarily mean that the facts were decided in favor of any one party. See Downing v. Chicago Transit Authority, 162 Ill. 2d 70, 77, 642 N.E.2d 456 (1994) ("[c]ourts cannot ignore the basis on which the summary judgment was granted").

We find that the allegations of the complaint as to the dispositions of the underlying lawsuits fail to satisfy the favorable termination element.

The special injury or special damage element requires more than the usual expense, time, annoyance or inconvenience expended in defending a lawsuit. (Bank of Lyons, 78 Ill. 2d at 239; Levin, 271 Ill. App. 3d at 730.) The special injury or special damage element of a malicious prosecution claim "has usually been identified with an arrest or seizure of property or some constructive taking or interference with the person or property." Levin, 271 Ill. App. 3d at 731.

In paragraph 91 of its complaint, plaintiff alleges its damages as follows:

> "91. CAN has been damaged by the multiplicity of actions brought by, at the behest of, or with the assistance of defendants, as set forth above, [1] in that it has incurred substantial attorneys fees and other legal costs in connection with the defense of the aforesaid actions; [2] in that CAN's insurance costs have increased substantially and CAN has become unable to obtain directors and officers liability

> insurance; [3] in that CAN's board members, paid staff, and volunteers have spent a substantial amount of time in activities related to the ligation [sic]; and [4] in that CAN's board members, paid staff, and volunteers have not spent the time that they have devoted to the litigation related activities to engaging in CAN's public education activities and their own associational activities."

We find that the allegations for damages do not satisfy the special injury requirement for purposes of a malicious prosecution claim but instead constitute the ordinary harm generated from any legal actions.

We also are not persuaded to find differently by the two cases on which plaintiff relies to support the favorable termination requirement and the special injury element, i.e., Shedd v. Patterson, 302 Ill. 355, 134 N.E. 705 (1922) and Payne v. Donegan, 9 Ill. App. 566 (1882). Plaintiff maintains that Shedd and Payne demonstrate that the filing of multiple frivolous lawsuits itself supports a finding of lack of probable cause, obviating the need to strictly construe the favorable termination requirement to insure compliance with that

element.

Neither Shedd nor Payne directly addressed the favorable termination element but rather turned upon the special injury element. Moreover, the underlying lawsuits which initiated the malicious prosecution claim in those cases were all actions asserting the same cause of action arising from the same facts and were brought by the same plaintiff against the same defendants. Furthermore, in Shedd, the successive suits occurred after the party accused of malicious prosecution had his day in court and after "the final and conclusive determination of his rights by this court." (Shedd, 302 Ill. at 360-61). The Shedd court specifically found that:

> "In this case the court had repeatedly decided that the defendant had no grievance, and the substantial questions involved were finally and conclusively settled in 1907 (citation omitted)." Shedd, 302 Ill. at 361.

Moreover, actions for malicious prosecution have long been disfavored in Illinois courts. (Shedd, 302 Ill. at 359; Levin, 271 Ill. App. 3d at 730.) In Shedd, the supreme court

explained the disfavored status of a malicious prosecution claim as follows:

> "This court has regarded it reasonable that the action should be limited because the courts of law are open to every citizen upon the penalty of lawful costs, and he may have his rights determined without the risk of being sued and having to respond in damages for seeking to enforce his right." Shedd, 302 Ill. at 359.

The Shedd court relied upon its prior decision in Smith v. Michigan Buggy Co., 175 Ill. 619, 51 N.E. 569 (1898), where the supreme court expressed its concern about the danger of such an action:

> "[T]he danger is that litigation will be promoted and encouraged by permitting such suits as the present action to be brought. This is so, because the conclusion of one suit would be but the beginning of another. A defendant, who had secured a favorable result in the suit against him, would be tempted to bring another suit for the purpose of showing, that there had been malice and want of probable cause in the prosecution of the first suit which he had won. Litigation would thus become interminable." Smith, 175 Ill. at 629.

We find that neither the favorable termination

requirement nor the special injury element is sufficiently pled in the complaint. Plaintiff urges us to veer from the stringent requirements established for a malicious prosecution claim; however, the principles established in case law are quire clear and we cannot ignore them.

Next plaintiff asserts that the flexibility of the waiver rule allows this court to consider whether the factual allegations in a complaint state a cause of action for abuse of process although that claim is not included in the complaint and although plaintiff raised it for the first time on appeal.

It is well-established that "issues not raised in the trial court may not be raised for the first time on appeal." (Eagan v. Chicago Transit Authority, 158 Ill. 2d 527, 534, 634 N.E.2d 1093 (1994).) In Eagan, the supreme court held that the plaintiff waived the issue of a special duty exception to immunity conferred by statute (Metropolitan Transit Authority Act) because he failed to raise it in his complaint and did not amend his complaint to include this exception. Notably, the

appellate court in Eagan not only addressed the special duty exception but relied on it to find that the defendant was not protected by this statutory immunity. The supreme court, however, reversed the appellate court and held that the plaintiff had waived the special duty exception and thus it was not properly before the court. (Eagan, 158 Ill. 2d at 534-35.) Like the present plaintiff, the Eagan plaintiff, upon the defendant's motion to dismiss in the trial court, elected to stand by his complaint and did not seek to amend. Eagan, 158 Ill. 2d at 530.

Plaintiffs [*sic*] already have filed three complaints in this matter and expressly elected to stand on its complaint even when the trial court afforded it yet another opportunity to amend at the hearing on defendants' motion to dismiss. Plaintiffs [*sic*] admit that the abuse of process claim was never raised until this appeal and we thus find the claim has been waived.

For all the foregoing reasons, we affirm the trial court's dismissal with prejudice of plaintiff's second amended

complaint.

Affirmed.

RIZZI, P.J., and CERDA, J., concur.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Cult Awareness Network	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 94 L 804
	:	
Church of Scientology International, Bowles & Moxon; and Church of Scientology of Illinois,	:	
	:	
Defendants.	:	

ORDER

This matter coming on for hearing on Defendants' § 2-615(b) Motion to Dismiss the second amended verified Complaint by prior court order, counsel for the parties being present and the Court having heard argument,

IT IS HEREBY ORDERED THAT:

Defendants' motion is granted and the second amended complaint is dismissed with prejudice.

Atty No. 90340
Name R. Peter Carey
Attorney for Defendants
Address 120 N. La Salle Street
City Chicago, IL 60602
Telephone (312) 236-7080

Judge Julia M. Nowicki
May 10, 1995
Circuit Court #293

ENTER:
JM Nowicki /s/
Judge Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION
Filed September 26, 1994

Cult Awareness Network,

Plaintiff,

vs. 94 L 804

Church of Scientology International,
et al.,

Defendants.

ORDER

The plaintiff, Cult Awareness Network, has brought a four count First Amended Complaint, which sets out 41 matters of underlying litigation from 7 states and the District of Columbia, each against the plaintiff, "Cult Awareness Network," (CAN) or some affiliate, mostly by a person or persons described as "a member (or members) of the Church of Scientology." Para. 120 alleges that the 41 suits were brought "to impede and prevent CAN from performing its public education functions," but the complaint never seems to plead that the underlying suits were brought for the benefit of the Church of Scientology International. (COSI).

The underlying suits pleaded were brought between November of 1991 and November of 1993, with 29 of them brought in 1992. The most common complaint in the underlying suit is that the defendants there (CAN or CAN affiliates) refused to allow the plaintiffs to join CAN, or refused to recognize organizations as CAN affiliates, or, in one case, refused the underlying plaintiffs to volunteer their services to CAN. (Para. 31) Some underlying suits complained of denials

of admission to CAN's annual meetings. (paras. 37, 49, 51).

Count 1 pleads "Conspiracy To Engage In Malicious Prosecution." Count 2 "Conspiracy To Interfere With Right Of Assembly and Association." Count 3 "Infringement Of Right Of Association and Assembly," and Count 4, against the Church of Scientology International (COSI) and the law firm of Bowles & Moxon, with the common law action of Maintenance.

Six defendants, COSI, Bowles & Moxon, Melberg, Lewis, Bashaw and COSO Illinois move to dismiss the complaint under 735 ILCS 5/2-615(b) and (e), arguing that Count 1 rests on instances of "malicious prosecution" and "unless the original complaints (in the alleged suits against plaintiff) constitute actionable claims for malicious prosecution, there can be no conspiracy to engage in malicious prosecution."

Those six defendants also move to dismiss Counts 2 and 3 because the counts fail to allege the existence of state action, arguing that the right of association and the right of assembly under the Illinois Constitution are rights guaranteed to the people against governmental interference, and do not restrict the actions or activities of private persons, corporations or organizations unless state action is involved.

These six defendants also move to dismiss Count 4 because Illinois has abolished the common law action of maintenance, citing Brush v. City of Carbondale, 229 Ill. 144. See 14 CJS 356, Champerty and Maintenance. 705 ILCS 215/26 does provide a criminal penalty for intermeddling in legal actions of others. The question is whether a civil action is possible.

Count 1.

In order to bring a conspiracy to commit malicious prosecution case, as defendants argue, there must be valid pleadings of instances of malicious prosecution. Malicious Prosecution is a disfavored cause of action because citizens should have free access to the courts to seek remedies for perceived wrongs, and such citizens should not be deterred from suing by fear of a subsequent prosecution against them. Berlin v. Nathan, 64 Ill. App. 3d 940; Schwartz v. Schwartz, 366 Ill. 247.

Courts maintain remedies to tax a plaintiff who brings a meritless law suit. See Supreme Court Rule 137.

The plaintiff responds to the six defendants motions to dismiss by arguing that there are five elements to an action for "Malicious Prosecution," and that plaintiff has pleaded all of them, including termination of the proceedings in favor of the plaintiff and special damages.

About "Malicious Prosecution," plaintiff argues that where, as here, there are pleadings of multiple underlying suits, as contrasted with a single underlying suit, "courts have been much more liberal in allowing (a) malicious prosecution claim to proceed."

But, as the defendants point out the 41 underlying cases did uniformly terminate "in favor of" the plaintiff, CAN. Several of the underlying actions are still pending. (Barton suit, pending in part, para. 40; Lippman lawsuit, para. 72; Wilson/Sterling lawsuit, para. 85; Haggerty lawsuit, para. 94; Batterschall lawsuit, para. 108; Meizes/Seidler actions, para. 110; Bashaw action, para. 112. Church of Scientology Of Orange County, dismissed, with leave to amend the complaint. para. 69. New York lawsuits, two suits remain pending, para.

98.

In order for there to be a precedent for a malicious prosecutions suit, there must be an adjudication of the facts favorable to the plaintiff in the malicious prosecution suit. Sutton v. Hofeld, 118 Ill. App. 3d 65. Here, many of the 41 underlying suits were dismissed on jurisdictional or other non-substantive grounds.

See the Bagley lawsuit, "moot", para. 23; Demeter lawsuit, voluntarily dismissed, para. 30; Bashaw lawsuit, "lack of jurisdiction", para. 33; Neilson lawsuit, "judgment paid", para. 36; Slesar/Wessling lawsuits, insufficient damages and a lack of "subject matter jurisdiction", para. 45; Woodard lawsuit, voluntarily dismissed, para. 54; Harness lawsuit, voluntarily dismissed, para. 57; Beardmore and Shaw lawsuits, voluntarily dismissed; Massachusetts lawsuits, voluntarily dismissed, para. 88; Oregan lawsuit, voluntarily dismissed, para. 100. As to these cases, as the pending cases, CAN cannot plead that it prevailed on the merits in the underlying suits or actions.

Defendants point out that other underlying cases were pending at the time of the Complaint, but were disposed of before the Amended Complaint. I do not reach this issue, since the cases have apparently been disposed of now.

Still others of the 41 cases have unusual histories. In one of them, a Counterclaim is complained of. (Demeter/ Cross, para. 28) There is no mention of what the first party action was. The Nordquist litigation may contain a statement that the lawsuit "was without foundation in fact." See para. 19.

However, some of the underlying cases were disposed of on the grounds that under the federal Civil Rights Act, 42 U.S.C. 1983 et seq. the plaintiff, CAN, was not a "place of

public accommodation" under 42 U.S.C. 2000. Others were dismissed because of the California Civil Rights Act did not protect access to private associations. There are at least 15 underlying cases in these categories, which seem to have been dismissed, or summary judgment granted, because individuals do not have a right to join or participate in the plaintiff organization, if the leaders of the plaintiff organization do not want them. Equal access to private property or private organizations is not a constitutional right per se. People v. DiGuida, 152 Ill.2d 104. The plaintiff may be able to plead a valid cause of action from these underlying cases.

The question which will come to the Court is whether these 15 underlying cases might constitute a valid cause of action for Conspiracy to Engage in Malicious Prosecution. I will strike Count 1 with leave to replead as to cases that ended with findings similar to the findings, which I have indicated: that the plaintiff organization is not a "pubic accommodation" under the law. These could be favorable dispositions under the law. The Nordquist case may also be included.

I would add that I believe that the defendants are correct that Malicious Prosecution requires a detailed pleading of Special Damages. I do not reach this issue today. See Kurek v. Kavanaugh, 50 Ill. App. 3d 1033. The Second Amended Complaint should not attempt to impress by virtue of its size, but by its inherent merit.

Count 2 and 3.

The United States Constitution guarantees that citizens shall have a right to freedom of association and the right to assembly. These great rights were not new in 1789. See the Magna Charta, 1215, and the Declaration of the Rights of Man adopted by the French Assembly in 1789. It is very clear that these rights were to protect people from the possibly heavy

hand of government.

The Illinois Constitution contains similar guarantees to those of the United States Constitution. Plaintiffs [*sic*] here seek to base causes of action on a reading of Article I of the Illinois Constitution which would expand the right of assembly and freedom of association to guarantee rights to citizens because of the perceived infringement of those rights by other citizens.

While the Illinois Constitution may be "locked" to the federal Constitution, or it may have broader protections, under no circumstances could the Illinois Constitution be turned around 180 degrees to mean something completely different from what the United States Constitution means.

People v. DiGuida, 152 Ill. 2d 104, speaks to these issues clearly. Counts 2 and 3 will be dismissed with prejudice. Plaintiff has preserved the issues for appeal.

Count 4.

Count 4 will also be dismissed with prejudice. There is not a civil cause of action for maintenance. Galinski v. Kessler, 134 Ill. App. 3d 602. The criminal penalties of 705 ILCS 215/26 preempt the area of this seldom encountered conduct. Curtailing of improper lawsuits is the jurisdiction of the courts and other branches of government.

Further, "assistance and support" in a lawsuit is protected speech and conduct under the Constitution. The purpose of organizations is to advance ideas and beliefs, and then give "assistance and support" to its members. Plaintiff has preserved this issue for appeal.

Plaintiff shall have 28 days to replead Count 1 of the

Second Amended Complaint, consistent with this order. It is so ordered.

THE COURT

Kenneth L. Gillis /s/
Kenneth L. Gillis, Judge